SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-563

LOCAL UNION NO. 11, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

vs.

GEORGE H. BOLDT, as Chairman of the Pay Board; JOHN T. DUNLOP, as Chairman of the Construction Industry Stabilization Committee; and LOS ANGELES COUNTY CHAPTER, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION,

Respondents.

On Petition of Certiorari to the Supreme Court of the United States.

Brief for Respondent Los Angeles County Chapter, National Electrical Contractors Association in Opposition.

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I.
Jurisdiction.

This is a brief in opposition to a petition for issuance of a Writ of Certiorari to review a judgment and opinion entered by the United States Temporary Emergency Court of Appeals on August 10, 1973. This Court has jurisdiction to entertain a timely filed petition for writ of certiorari pursuant to §211(g) of the Economic Stabilization Act of 1970, P.L. 91-379, August 15, 1970, as amended.

II.

Preliminary Statement.

The essential facts of this case have been adequately stated by the petitioner in the Petition for Writ of Certiorari. The petitioner seeks a determination by this Court that the action of the Construction Industry Stabilization Committee ("CISC"), in reducing a portion of a negotiated wage increase due June 1, 1972, and contained in a collective bargaining agreement between Local Union No. 11, International Brotherhood of Electrical Workers, AFL-CIO ("Local 11") and the Los Angeles County Chapter, National Electrical Contractors Association ("NECA"), was violative of the Fifth Amendment to the United States Constitution as a taking of property without payment of just compensation.

The sole clarification which respondent NECA would make with regard to petitioner's statement of essential facts concerns Local 11's self-serving statement that it gave up a particular noneconomic item (a travel clause permitting assignment to jobs not immediately adjacent to the employee's home) as a direct *quid pro quo* for the full negotiated wage increase. [Petition, p. 5] Nothing in the record supports this statement, nor has petitioner cited to any evidence whatsoever in the record that this is a fact. Such an assertion is totally unsupported and should therefore be disregarded by this Honorable Court.

III.

Argument.

The Petition Raises No Constitutional Issue Warranting Review by This Court.

Petitioner advances the ill-conceived and unsupportable argument that the CISC decision cutting back the negotiated wage increase of $1.71 per hour to $1.00 per hour constituted a taking of property (a contractual right) without just compensation. However, applicable case authority conclusively refutes this proposition.

In the first place, it is noteworthy that the Economic Stabilization Act as a whole has been emphatically upheld against constitutional attack on a wide variety of constitutional grounds. *Amalgamated Meat Cutters and Butchers Workmen v. Connally, et al.*, 337 F. Supp. 737, 744-63 (D.D.C. 1971). Beyond this, it is clear that the exercise of legitimate governmental powers pursuant to regulatory economic programs has never been held to constitute a "taking" of property which would require payment of compensation under the Fifth Amendment. *Bowles v. Willingham*, 321 U.S. 503 (1943); *Legal Tender Cases*, 79 U.S. (12 Wall.) 458, 551-2 (1870); *Wilson v. Brown*, 137 F. 2d 348 (Emer. Ct. App. 1943).

Thus, in *Bowles v. Willingham, supra*, it was argued that the Emergency Price Control Act of 1942 established rent control rules which constituted a taking of property in violation of the Fifth Amendment. The

United States Supreme Court rejected this argument, stating as follows (321 U.S. at 417-18):

> ". . . We are not dealing here with a situation which involves a 'taking' of property. Wilson v. Brown (Em Ct App); 137 F(2d) 348, supra. By §4(d) of the Act it is provided that 'nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.' There is no requirement that the apartments in question be used for purposes which bring them under the Act. Of course, price control, the same as other forms of regulation, may reduce the value of the property regulated. But, as we have pointed out in the Hope Natural Gas Co. Case (320 US p 601, ante, 344, 64 S Ct 281), that does not mean that the regulation is unconstitutional. Mr. Justice Holmes, speaking for the Court, stated in Block v. Hirsh, supra (256 US p 155, 65 L ed 870, 41 S Ct 458, 16 ALR 165): 'The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay.' A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power."

In *West States Meat Packers Association v. Dunlop*, No. 9-8, ... F. 2d .... (Temp. Emer. Ct. of App., September 1, 1973), it was similarly argued that the temporary ceilings imposed on beef prices as part of the Phase III economic program constituted an unconstitutional taking of property in violation of the Fifth Amendment. In rejecting this argument, the Temporary Emergency Court of Appeals first quoted from *Bowles, supra*, and stated the general proposition that government economic controls do not constitute a taking of property prohibited by the Fifth Amendment. The Court next noted the case of *Pacific Coast Meat Jobbers Association v. CLC*, No. 9-7, ... F. 2d .... (Temp. Emer. Ct. of App., August 18, 1973), in which it held that the setting of ceiling prices on beef by the Cost of Living Council was not arbitrary or capricious, and concluded regarding the Fifth Amendment "taking" issue as follows:

> "Since this court held in *Pacific Coast* that the imposition of the price ceiling on beef was a valid exercise of the regulatory powers vested in the President and CLC by the Act, it is clear that there has been no taking here." (See CCH *Economic Controls*, p. 9260).

It is clear, therefore, that if the government agency is acting *lawfully* within the *authority* granted pursuant to the economic program, then there is no "taking" of property in violation of the Fifth Amendment.

In the instant case, Local 11 argued unsuccessfully in the trial court that the CISC exceeded its authority and acted arbitrarily and capriciously in cutting back a portion of the negotiated wage increase. This argument was also rejected by the Temporary Emergency

Court of Appeals, and Local 11 does not appeal the Court's ruling on that issue in this petition. In view of the rule quoted *supra*, it is difficult to perceive the manner in which the CISC could have "taken" property when it has already been determined (and *not* contested by Local 11 on this petition) that the CISC has validly exercised its regulatory powers. As the authorities cited above indicate, the valid exercise of governmental regulatory power which incidentally impairs a private economic benefit does not rise to the level of a "taking" in violation of the Fifth Amendment.

In reality, Local 11 is simply arguing that the government has unlawfully impaired the obligation of its contract in violation of the Constitution. However, in *Amalgamated Meat Cutters & Butcher Workmen v. Connally, et al.*, 337 F. Supp. 737, 763-4 (D.D.C. 1971), in which unions attacked a government wage/price freeze that effectively prevented the implementation of negotiated wage increases, the court stated (*Id.* at 763):

> "The Union complains that its contracts have been impaired without constitutional authority or validating executive findings. But it is plain beyond doubt that contracts do not fetter the constitutional authority of Congress. [citing cases] 'Immunity from federal regulation is not gained' either through 'forehanded contracts', see *Fleming v. Rhodes*, 331 U.S. 100, 107, 67 S. Ct. 1140, 91 L. Ed. 1368 (1947), or through contracts that, however commendable when signed, would frustrate government programs if carried into effect."

See also *Univ. of Southern California v. Cost of Living Council,* 472 F.2d 1065, 1070 (Temp. Emer. Ct. of App. 1972) [Cert. Denied, 93 S. Ct. 1364, February 20, 1973].

In a transparent attempt to skirt this holding, Local 11 has phrased the exact same complaint (*i.e.*, impairment of negotiated wage increases under a collective bargaining contract) in terms of a "taking" of a property right. Such a contention is totally without merit, especially where its acceptance would frustrate the implementation of national economic policy. The only case cited by petitioner which even remotely relates to this case is *Johnson v. United States,* 79 F. Supp. 208 (Ct. Cl. 1948), which dealt with a statutory right of life salary for resigned federal judges. That case is obviously inapplicable herein because it involved a *statutory,* not contractual, right, and more importantly did *not* involve a conflict between a right to salary and the implementation of national economic policy.

Clearly, the Fifth Amendment to the U.S. Constitution is not violated by every hardship or frustration which the comprehensive national economic program causes, whether it be with regard to prices or wages. If petitioner's position is accepted, there could be no national economic policy which seeks to reduce inflation; the government's hands would be hopelessly tied. It is apparent, therefore, that the instant petition presents no constitutional issue warranting review by this Honorable Court.

IV.

Conclusion.

For all the foregoing reasons, the Petition for issuance of a Writ of Certiorari to review the judgment and opinion of the Temporary Emergency Court of Appeals must be denied.

Dated: October 22, 1973.

Respectfully submitted,

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